No. 18684

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN ARIZONA YORK REFRIGERATION COMPANY, *et al.*,

Appellants,

vs.

THE BUSH MANUFACTURING CO., *et al.*,

Appellee.

On Appeal From the District Court of the United States Southern District of California, Central Division.

APPELLANTS' REPLY BRIEF.

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TOPICAL INDEX

Page

TABLE OF AUTHORITIES CITED

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I.
STATEMENT OF FACTS.

Appellants are forced to disagree with appellee concerning certain matters appellee erroneously states as facts.

1. Witness Gerhardt testified that "In my opinion the weld was not strong enough, or expansion and contraction loosened it in some manner so that it leaked". [Tr. p. 65, lines 17-20.] The weld spoken of was made by appellee and witness Gerhardt further stated that "If a hammer would hit it, it would have bent the tube" and then, in answer to the question "You don't remember seeing any bent tubes?", the answer was "No". Defendant's Exhibits B, C, D, F and G also show no bent tubes in the defective coil.

2. Appellee is in error in stating that the testimony of witness Alan Decker, appellee's vice president in charge of engineering, did not make the statement that arcing at the cold juncture of the heater element inside the innertube could have caused trouble". Said statement appears almost verbatim on page 96, lines 9 to 17 of Transcript.

3. Witness Morelli agreed with the statement made by appellee that "Essentially, it is your testimony, Doctor, that there could be a crack or slit in a well (meaning the innertube in which the heater element was housed) due to a differential in the coefficient of expansion of the inner and outer tubes". Answer "Yes, sir, it could develop."

4. This honorable court found that the trial court in the case of *Authorized Supply Company of Arizona, a corp., appellant v. Swift & Company, a corp., et al., appellees,* and *Arizona York Refrigeration Company, a corp., et al., appellants v. Swift & Company, a corp., appellee,* 271 F. 2d 242 (1960) Ninth Circuit, rehearing 277 F. 2d 710 (1960) Ninth Circuit, at p. 712 found as a fact that "The sole cause of damage was the manufacturer's defect in one of the refrigeration coils". Also, the trial court found that damages sustained in the amount of $9,175.29 were due as a proximate result of the defective refrigeration coil. Appellee hints in its statement of facts that gas escaping as a result of a defective lock might have been the proximate cause of the damages sustained by Swift & Company and obtains this fact from the transcript of the record of the previous trial. This was not found to be a fact by the trial court.

II.
SUMMARY OF ARGUMENT.

1. Appellants can rely on the theory of collateral estoppel and *res judicata* to establish the fact of the defective coils, proximate cause of damage and the amount of property damage.

These issues were decided at the time of the first trial and appellee having been offered the opportunity to defend and having refused to do so, is estopped to deny them.

2. Appellants' cause of action in this case is based on the common law doctrine of equitable indemnity. This theory is embodied in the statement "One compelled to pay damages on account of a negligent or tortious act of another, has a right of action against the latter for indemnity".

3. The doctrine of *res ipsa loquitur* applies in this case. It applies whether the injury is for property damage or for injury to the person. The doctrine is not limited to situations in which there is privity between the supplier of a chattel and other parties, nor is it limited to articles manufactured which are of an inherently dangerous nature.

4. The statute of limitations applicable to this case is governed by Section 339(1) of the California Code of Civil Procedure and the present action was not outlawed prior to its commencement.

5. The court has jurisdiction in this case in that the damages to property by stipulation were $9,175.29 and appellant has paid $5,060.70 in expense and legal fees and both the damages and expenses are includable as compensable damages in an action for equitable indemnity.

III.
ARGUMENT.

1. Appellee's Attempts to Differentiate All the Cases Cited in Appellants' Opening Brief Having to Do With Collateral Estoppel on the Basis of Citing Special Circumstance Tending to Prove That Each Case Does Not Apply in the Instant Case, Are Completely Ineffective.

All cases quoted previously are in point. *Lamb v. Belt Casualty Company,* 3 Cal. App. 624, 40 P. 2d 311; *Bachman v. Independence Indemnity Company,* 112 Cal. App. 465, 297 Pac. 110; *Santa Cruz Portland Cement Company v. Snow Mountain Water and Power Company,* 96 Cal. App. 615, 274 Pac. 617; *West Jersey and SSR Company v. Atlantic City Electric Company,* 107 New Jersey Equity 457, 153 Atl. 254. All have to do with the factual situation wherein and whereby defendant in the action was requested to defend, refused to do so and then on an indemnity action, collateral estoppel was invoked to prevent the denial of facts determined in the previous litigation. The parties were not the same and they were not in privity in the second litigation in each instance.

The theory, of course, was and is simply that the defendant having been afforded ample opportunity in court to defend himself and having refused to do so, cannot at a later date deny facts determined and issues litigated at the time of the original action.

As a matter of fact, the theory of collateral estoppel and *res judicata* in connection with this kind of action

goes even further, for in the case of *San Francisco Unified School District v. California Building Maintenance Company* (1958), 162 Cal. App. 2d 434, 328 P. 2d 785, the court decided that determination in a prior action by the employee of a maintenance company against the school district that School District failed to furnish employee safe place in which to work, was *res judicata* in action by the School District against the maintenance company seeking indemnity under implied contract of indemnity for damages that it was compelled to pay prior to judgment, although the maintenance company was not a party to the prior action and had not been called upon to defend the original action. The court stated:

> "Something should also be said about the doctrine of res judicata and the doctrine of collateral estoppel. Are the issues determined in the action by Dubay against the School District, res judicata in this action by the School District against the maintenance company? We think they are, that is, whatever was determined in the prior action is res judicata in the instant case although the maintenance company was not a party to the action."

Also in line with this case, see *Los Angeles County v. Cox Brothers Construction Company* (1961), 195 Cal. App. 2d 836, 16 Cal. Rptr. 250, wherein *res judicata* was invoked against Cox Brothers Construction Company, even though they were not called upon to defend.

2. **As to Equitable Indemnity, the Case of Alisal Sanitary District v. Kennedy, 180 Cal. App. 2d 89 (1960), 4 Cal. Rptr. 379, the Elements of the Suit Are Explained in Great Detail, When It Was Held That the Alisal Sanitary District Had a Right of Indemnity Over and Against Kennedy on the Basis of His Negligence in Bringing About Damages Elected From the City Through the Law of Nuisance and Inverse Condemnation.**

In the state of the citus of the injury, Arizona, there are at least three cases recognizing the doctrine. In the case of the *Busy Bee Cafee v. Ferrell,* 82 Ariz. 192, 310 P. 2d 817, the Busy Bee Cafee, a partnership, in an original action was held to be liable for personal injury suffered when Ferrell negligently left open a trap door. The partnership recovered from Ferrell on a suit for equitable indemnity and the court stated

> "Where one is liable by construction of law on account of some omission for protection or care, he has the right to be indemnified by the wrongdoer."

In the case of *Krause v. Wilbur Ellis Company*, 77 Ariz. 359, 272 P. 2d 352, Krause purchased some insecticide from Wilbur Ellis Company, sprayed his fields and in so doing, the insecticide caused damages to adjacent crops. Krause was held liable under an interpretation of Arizona law and sued the insecticide manufacturer on the ground of an implied contract for indemnity and by reason of that fact, the court held that the insecticide manufacturer through its negligence was liable to Krause.

Also, see Corpus Juris Secundum under the title: *Indemnity For Another's Wrong,* where it is stated

> "One compelled to pay damages on account of a negligent or tortious act of another, has a right of action against the latter for indemnity. It is a well recognized rule that an implied contract of indemnity arises in favor of a person who, without any fault on his part is exposed to liability and is compelled to pay damages on account of the negligent or tortious act of another, the former having the right of action against the latter for indemnity, provided that they are not joint tort feasors such as to prevent recovery as discussed infra Section 27. This right of indemnity is based on the principle that everyone is responsible for his own negligence and if another has been compelled by the judgment of a court having jurisdiction to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him. It exists independently of statute and whether or not contractual relations exist between the parties and whether or not the negligent person owed the other person a special or particular legal duty not to be negligent."

If ever a case fell precisely into that formula and the elements named there, it would seem to be the present one.

3. Res Ipsa Loquitur in This Factual Situation Raises an Inference That the Defective Coils Which Were Found as a Fact by the Trial Court at the Previous Trial to Be Defective Were Negligently Designed or Manufactured.

The unique argument contained on page 13 of appellee's brief that appellants assume "That the 'Accident' herein was a kind which ordinarily does not occur in the absence of someone's negligence; an assumption that is not warranted;" would seem to be somewhat unusual, to say the least.

Is appellee contending that it ordinarily does furnish defective coils to its customers? Or that its coils ordinarily develope defects after installation?

These refrigeration coils were furnished appellants and installed in Swift & Company's plant by appellant. There is absolutely no evidence whatsoever of any negligent acts performed by appellants or for that matter, by Swift & Company, but there is an abundance of evidence to the effect that no "outside force" of any kind altered these specific coils at any time before any defect occurred in the coils, and each of the coils became defective exactly in the same way that the previous coil had become defective.

The defective coil which proximately caused the damages had been installed for a period of three months before it became defective and appellee was informed by appellants of each of the defects in each of the coils as the defect occurred. They were all repaired in exactly the same manner at the instance and instruction of appellee's agent, servant and employee who knew exactly how to remedy the situation and gave instructions how to do so.

Appellants were reimbursed for the corrective measures taken at the instruction of appellee. Appellee, by its conduct, in not only paying for the welding that was necessary to correct on a temporary basis the defects in the coils, but in replacing them, would logically seem to have performed an act of admission against interest which could be interpreted as knowledge on its part that it was responsible for the defects, either in the manufacturing or design.

Nothing in the testimony of any of the witnesses and nothing that appellee has brought out in its argument can change these facts.

The argument that appellant has relied upon case theory that involved only personal injury and then only due to an inherently dangerous chattel, is erroneous.

While it is true that a majority of the cases applying the doctrine of *res ipsa loquitur* for products liability involve personal injury and in addition, any defective condition in a product can or could cause it to become dangerous to a person, the cases certainly do not exclusively involve personal injury, and many of them have nothing to do with chattels which are inherently dangerous.

Thus, although in the cases of *Baker v. B. F. Goodrich,* 115 Cal. App. 2d 221, 252 P. 2d 24 (explosion of a new tire being mounted and inflated by plaintiff); *Rohar v. Osborne,* 33 Cal. App. 2d 345, 282 P. 2d 125 (explosion of weed burner rented to plaintiff's employer); *Maercherlin v. Sealy Mattress,* 145 Cal. App. 2d 275, 302 P. 2d 331 (mattress spring working through); *Dunn v. Vogel Chevrolet,* 168 Cal. App. 2d 117, 335 P. 2d 492 (brake failure due to defective brake hose); *Reynolds v. Natural Gas Equipment Company,*

184 Cal. App. 2d 724, 7 Cal. Rptr. 879 (explosion of industrial gas burner); *Woodworkers Tools v. Burn,* 197 F. 2d 667 (disintegration of panel razor head on shaper while being used by plaintiff), all invoked the doctrine of *res ipsa loquitur* and all involved personal injury at the time when the defendant did not have control of the product causing the injury.

But, in none of these cases was the fact mentioned that the product had to be an inherently dangerous one before the doctrine could be applied or liability could be imposed.

In addition thereto, the cases are not confined exclusively to damages for personal injury. In the case of *Wiedert v. Monahan Post Company,* 243 Iowa 643, 51 N. W. 2d 400, a water heater had been cleaned by defendant plumber and a leak developed one to two hours later, damaging merchandise and the doctrine was applied. In the case of *Plunket v. United Electric Service,* 214 La. 145, 36 So. 2d 704, the doctrine was applied on fire damage to a house which was caused by a heater unit installed two days previously. Again, in *Winkle v. Lees Plumbing and Heating Company,* 257 Minn. 14, 99 N. W. 2d 779, property damage resulted from the installation of a wash bowl, installed in April of 1955, and the damage occurred in December of the same year. In the case of *Day v. National U. S. Radiator* (La. 1959), 117 So. 2d 104, a heater exploded during the construction of a building and *res ipsa loquitur* was applied against the architect.

In that case, the court stated

> "Control by the defendant of the offending device appears no longer to be an absolute requirement for the application of the res ipsa loquitur

> doctrine, provided that other factors usually required are present, chiefly absence of knowledge on the part of the injured party concerning the cause of the incident and superior ability of the defendant to explain the occurrence."

Applying that language to this factual situation, most assuredly appellee was in a superior position to determine and explain why these coils became defective in the manner and way in which they did, and appellant most assuredly is unable to explain the defect.

In the case of *Ryan v. Zweck Wollenberg* (Wis. 1960), 64 N. W. 2d 226, plaintiff suffered injuries from a refrigerator that was three years old, a unit consisting of a motor and compressor had been sealed within a metal enclosure and had never been opened or tampered with by anyone from the time the refrigerator was removed from its original shipping crate in which the refrigerator was shipped by the manufacturer, to the time when the user of the refrigerator door was injured by an electric shock when she touched the handle of the refrigerator, the court found that even though three years had elapsed from the time the refrigerator passed out of the possession of the manufacturer, *res ipsa loquitur* was applicable.

It can thus be seen that neither the necessity of exclusive control by defendant at time of injury, nor an inherently dangerous product is necessary to the theory propounded by appellants in this case.

4. The Statute of Limitations in the Present Case Is Governed by Section 339(1) of the California Code of Civil Procedure in That It Is an "Action Upon a Contract, Obligation or Liability Not Founded Upon an Instrument in Writing".

Section 339(1) of the California Code of Civil Procedure allows a period of two years from the date of injury for the filing of a law suit.

The obligation or liability of the appellee to appellants actually occurred in the present case at the moment that appellants paid the judgment imposed upon it by law, the date said judgment was paid off was July 26, 1960. This action was originally filed March 15, 1961, within one year of the date that the original judgment was paid off. In the case of *De La Flores v. Yandle* (1959), 171 Cal. App. 2d 59, 340 P. 2d 52, the owner of a truck employed the plaintiff to repair the axle, the plaintiff then sublet the work to the defendant, the defendant negligently did the work with the result that the truck ran off the highway and struck an automobile operated by deceased. Plaintiff and the owner of the truck settled the suit with representatives of the deceased for $45,000.00, the plaintiff then brought suit on the grounds of equitable indemnity against Yandle, who had negligently repaired the axle and was held by the court in reversing the suspension of a demurrer without leave to amend that plaintiff stated a cause of action. It was also decided by the court that the right to indemnity did not arise until the compromise had been perfected and

appellants had obtained the release of liable parties. According to the complaint, that occurred May 6, 1955, and the action was begun April 9, 1956, less than a year after the accrual of the cause of action. The action was therefore not barred by the statute of limitations pleaded.

In 42 Corpus Juris Secundum at p. 603, it is stated

> "The right to sue for indemnity accrues when a payment has been legally made for indemnity. As a general rule, the right to sue for damages resulting from the negligent misfeasance or malfeasance against another, accrues only when payment has been legally made by the indemnitee. . . . While to be entitled to indemnity, an actual legal liability must have been sustained, the indemnitee may adjust and pay the claim without awaiting the result of the suit, provided the amount paid is reasonable and in good faith."

5. **The Present Court Has Jurisdiction Because an Action for Indemnity Includes Not Only the Amount of Damages Sustained by the Indemnitee, but All Reasonable Expenses He Has Incurred in Defending Himself From the Original Action.**

Thus, in the case of *Commercial Standard Insurance Company v. Cleveland,* 86 Ariz. 288, 345 P. 2d 210, it is stated that

> "If the indemnitor has knowledge of the proceedings and refuses to defend and the indemnitee incurs legal expenses, such expenses are chargeable to the indemnitor."

Additionally, in the cases of *Alisal Sanitary District v. Kennedy,* 180 Cal. App. 2d 289 (1960), 14 Cal. Rptr. 379, includable in the complaint were not only damages, but legal expenses involved in defense. Such was also the case in *Pierce v. Turner,* 205 Cal. App. 2d 264, 23 Cal. Rptr. 115.

It can thus be seen that appellants' cause of action comes within the jurisdiction of this court for this reason.

Conclusion.

Trial court should be reversed and judgment entered on behalf of appellant.

Respectfully submitted,

JOHN W. MORAN,
Attorney for Apepllants.

Certificate.

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN W. MORAN.